2011

Todd Flemal v. Utah Labor Commission, Chad Ewing, d.b.a Italian Drywall and Uninsured Employers Fund : Brief of Petitioner

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Alan L. Hennebold; Utah Labor Commission; Theodore E. Kanell; Plant, Christensen, and Kanell; Edward O. Ogilvie; Uninsured Employers' Fund; Attorneys for Respondents.
Michael Gary Belnap; Attorney for Petitioner.

IN THE UTAH COURT OF APPEALS

TODD FLEMAL, Petitioner, v. UTAH LABOR COMMISSION, CHAD EWING, d.b.a . ITALIAN DRYWALL, and UNINSURED EMPLOYERS FUND, Respondents.	Appeal No. 2011-0022 Priority No. 7

BRIEF OF PETITIONER TODD FLEMAL

PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR COMMISSION

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JURISDICTION OF THE COURT

This appellate review proceeding arises from the Utah Labor Commission's denial of an injured employees' claim for workers compensation benefits. The Utah Court of Appeals has jurisdiction over this proceeding pursuant to Utah Code Annotated § 78-2a-3 (2) (a) (1953, as amended), Utah Code Annotated § 34A-2-801 (8) (1997) and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1: Did the Petitioner establish legal causation by demonstrating by a preponderance of the evidence that he was in the course and scope of his employment with Respondent Ewing at the time of his industrial injury.

Standard of Review: This is a mixed question of law and fact to which this Court extends "heightened deference" to the Commission's determination" with varying degrees of strictness, falling anywhere between a review of 'correctness' and a broad 'abuse of discretion' standard." Drake v. Industrial Commission, 939 P.2d 182 (Utah 1977).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. e.g., State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984); and McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

Preservation for appeal. All of the above issues were raised by Petitioner

before the Utah Labor Commission.

A Petition for Review was timely filed with this Court.

DETERMINATIVE STATUTES AND RULES

Utah Code Annotated, Section 34A-2-401 (1953 as amended), is the applicable Statue and provides as follows:

> (1) An employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid:
> (a) compensation for loss sustained on account of the injury or death;
> (b) the amount provided in this chapter for:
> (i) medical, nurse, and hospital services;
> (ii) medicines; and
> (iii) in case of death, the amount of funeral expenses.
>
> **********

The complete Statute is attached hereto in Addendum "A".

STATEMENT OF THE CASE

Nature of the Case: The Petitioner, Todd Flemal, seeks review of the Utah Labor Commission's denial of his claim for medical expenses, permanent partial disability compensation, permanent total disability compensation and future medical expenses for injuries to his left hand, arising out of and in the course of his employment with Respondent, Chad Ewing, d.b.a. Italian Drywall.

Course of Proceedings: Mr. Flemal filed an Application for Hearing for workers' compensation benefits on account of an April 16, 2007 injury to his left

hand, incurred in the course and scope of his employment with the Respondent Chad Ewing, d/b/a Italian Drywall. (R at 1-2).

Respondent Chad Ewing d/b/a Italian Drywall filed a Response to the Petitioner's Application for Hearing on or about February 9, 2009 denying that Petition was ever an employee, and that he had been terminated from employment because of possession "illegal use of illicit drugs," so that his injuries did not arise in the course of employment. (R at 25-28.

In a prior proceeding concerning this incident it was alleged that Respondent Ewing was insolvent and so on or about January 22, 2009, The Uninsured Employers' Fund entered an Appearance and filed an Answer pursuant to Utah Code Ann. § 34A-2-701. In that Answer, the Fund also denied that Petitioner was not injured within the course and scope of his employment, that he was medically stable and that the Fund had no obligation to him. (R At 11-14)

Notice of Formal Hearing was sent to all parties on February 17, 2009, setting Mr. Flemal's claim for Hearing on June 30, 2009. (R at 29).

Liberty Mutual filed a Motion to Dismiss itself as a party Respondent on February 4, 2009, on the basis it did not insure Respondent Ewing. (R at 20-23). On February 13, 2009 Respondent Ewing also filed a Motion to Dismiss, alleging that Petitioner Flemal was not an employee. (R at 30-43). On March 5, 2009, Administrative Law Judge Deidre Marlowe granted Liberty Mutual Motion and dismissed it as a party, but denied Respondent Ewing's Motion to Dismiss. (R at 44).

Pretrial Disclosures were filed by The Uninsured Employers Fund (R at 49), Chad Ewing (R at 50-53, 57-60) and Petitioner Ewing. (R at 54-56).

A Hearing was held on June 30, 2009 (R at 162) and on October 30, 2009, Administrative Law Judge Marlowe entered Findings of Fact and Interim Order directing the medical aspects of this case to a Labor Commission medical panel for further evaluation. (R. at 62-67). On January 29, 2010 a Memorandum referral was made to Dr. Joseph Q. Jarvis appointing him "... to conduct an impartial evaluation of the medical aspects of this case." (R at 68-70).

On May 6, 2010 the Medical Panel Report was received. The Panel determined that Petitioner's condition stabilized on October 1, 2007 and that a 5% who person permanent physical impairment was attributable to Mr. Flemal's industrial injury. (R. at 72-73). The Panel Report was sent to all parties on May 6, 2010 and they were each given twenty (20) days to file any objections. (R at 71). None were received.

On August 2, 2010, Administrative Law Judge Deidre Marlowe entered Findings of Fact and Conclusions of Law finding that Mr. Flemal was an employee of Respondent Chad Ewing, d/b/a Italian Drywall, that his left hand injury was sustained in the course of his employment and she awarded Petitioner Temporary Total and Permanent Partial compensation, as well as all necessary medical expenses. (R at 74-81). A copy of here Order is attached hereto in Addendum "B".

On August 19, 2010, Respondent Chad Ewing filed a Motion for Review with accompanying Memorandum in Support. (R at 82-137). On August 30, 2010, the

Uninsured Employers' Fund joined in Ewing's Motion for Review. (R at 138-140). Petitioner filed a Response Memorandum on September 9, 2010. (R at 141-149). A Reply Memorandum from Mr. Ewing was received on September 20, 2010. (R at 150-153).

On December 15, 2010 the Utah Labor Commission issued an Order Reversing ALJ's Decision and Denying Benefits. The Commission set aside Judge Marlow's award of benefits concluding that Mr. Flemal's injuries did not arise in the course of his employment and were thus not compensable. His claim for benefits was dismissed. (R at 157-160). A signed copy of said Order is attached hereto in Addendum "C".

A Petition for Review was timely filed with this Court on January 11, 2011.

Statement of Facts: The medical aspects of this case are not in dispute. The manner in which Mr. Flemal's injury occurred and the extent of his injuries is not disputed by the parties. The sole factual issue to be determined and upon which his right, if any, to compensation is based, is whether Mr. Flemal was an employee of Respondent Chad Ewing, dba Italian Drywall at the time of his injury.

The relevant facts concerning that issue are as follows:

1. Respondent Ewing is and was a drywall contractor. On or about March 1, 2007, Mr. Ewing hired Petitioner as a "helper". His duties included whatever he was asked to do from doing cleaning up, assisting in sheetrock installation, getting needed items from the truck and generally "lending a hand." (Tr. at 57,). When Mr. Ewing was asked whether Petitioner was an employee, an independent contractor,

a subcontractor or something else, Mr. Ewing testified "I've never really thought of it like that." Ewing testified that he paid Petitioner daily; in cash, and without withholding any taxes or providing any wage statements. (Tr. at 57-58). Petitioner denied that he was paid daily and testified that he had been paid only $50-$100 with the balance to be paid when Mr. Ewing was paid for the job. (Tr. at 17-18, 26-28).

2. Ewing admitted that he did not without taxes from his employees and did not maintain workers' compensation insurance, despite being aware that he was required to do so. (Tr. at 58, 67).

3. On April 16, 2007, Respondent Ewing picked Petitioner up at his residence and drove him to and from the various work sites as was their normal course and procedure. On this date they were working on a job site in Syracuse, Utah doing "taping and mudding." (Tr. at 17-18).

4. Respondent Ewing testified that on that date, at approximately 10:30-11:00 am, they were working in the basement and that when he walked around a corner, he saw Petitioner with a hypodermic needle in his hand. Ewing could not describe the size or nature of it, other that it had a "orange lid." (Tr. at 63-64). He did not know the contents of the needle and did not see Flemal inject himself. (Tr. at 64). There was no evidence that Mr. Flemal was under the influence of drugs. Mr. Flemal admitted being a IV drug user, but denied using drugs that day and stated that he would not have brought a needle to the workplace. (Tr. at 19-20, 25, 72-73).

5. Ewing testified that he told Flemal that "he jeopardized me bringing that stuff on the job" and that "I probably won't need him no more." (Tr. at 59-60). His

version was loosely supported by the testimony of his roommate and employee Nicholas C. Bassett, who testified that he heard Mr. Ewing tell Mr. Flemal that he "wasn't going to need his help anymore" but did not hear the reason for that termination nor did he see the alleged needle. (Tr. 48-49). Mr. Ewing then immediately left the work site to run errands, leaving Petitioner at the work site, without transportation or anyway to leave. (Tr. at 49, 60, 68-69).

6. Petitioner denied being told that he was terminated and instructed not to do any further work, but rather that he was given duties to perform that day, including helping Nick Bassett mud the ceiling. (Tr. at 29). Ewing, in an affidavit prepared by him without the assistance of counsel stated that after terminating Flemal, he **"was told not to do any services other than menial clean-up."** (bold in original). (Tr. at 33).

7. Petitioner further testified that both Ewing and Bassett knew he used drugs because all three of them had smoked methamphetamine together on a "dozen or more occasions" at Ewing's home and on job sites when nobody was around. (Tr. at 73). Ewing denied ever smoking methamphetamine. (Tr. at 66). Bassett offered no testimony as to their mutual drug use.

8. Mr. Bassett testified that after Ewing had left the work site that Petitioner siad "Well, since I'm here I'm gonna sweep." (Tr. at 49-50). He was taping the ceiling and saw Petitioner standing on a bucket in order to reach the ceiling and help. (Tr. at 50). Bassett could not explain why Petitioner would do work after being terminated. (Tr. at 50).

9. Mr. Flemal testified that he and Bassett were taping and mudding the ceiling as instructed and that as he was running a knife across and wiping off the mud the crate tipped over, he fell down and a inch-and-a-half Grabber screw went through the palm of his hand. (Tr. at 19).

10. Bassett used Petitioner's cell phone to call Ewing to report the accident, but it is unclear whether they ever personally talked or whether only a message was left. (Tr. at 20). Flemal had started walking to the hospital when Ewing did return and drove Mr. Flemal to the hospital for treatment. (Tr. at 21).

11. Petitioner testified that Ewing instructed him to tell the doctors that he had injured his hand at home and not on the job. (Tr. at 31). The medical records reflect that is what he did initially tell the Davis Hospital staff. (Medical Records Exhibit at 5). Ewing denied having told Flemal to lie about where the accident had occurred and said that Petitioner spontaneously declared that is what he was going to do, presumably to avoid a mandatory drug test. (Tr. at 60-61).

12. Petitioner testified that Respondent Ewing offered to pay his medical bills and did give him approximately $200 to reimburse him for his prescriptions. (Tr. at 21-22). Ewing admitted visiting Flemal every day of the week he was in the hospital and taking him to his doctor appointments, but said that any payments he made to Petitioner for medical bills were done out of sympathy rather than obligation. (Tr. at 70-71).

SUMMARY OF ARGUMENT

Petitioner was an employee of Respondent Ewing at the time of his industrial

injury, which occurred in the course and scope of his employment. Respondent Ewing's claim that he had terminated Petitioner is not credible and is not consistent with the facts and the inferences fairly drawn therefrom.

ARGUMENT

I

THE WORKERS COMPENSATION ACT IS TO BE APPLIED LIBERALLY IN FAVOR OF AWARDING BENEFITS AND ALL DOUBTS AS TO COVERAGE ARE TO BE RESOLVED IN FAVOR OF THE INJURED WORKER.

Few principles of workers compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977); Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra, discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the

Act, and stated as follows:

> We are also reminded that our statute requires that the statues of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'
>
> * * * * * *
>
> In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of [or] in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to `employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. Id. at 1021-1022. (Emphasis added)

Whenever any doubt or uncertainty appears in the record, it must be resolved in favor of the injured worker and the awarding of benefits. The Utah Labor Commission failed to properly apply this vital rule of construction, especially in regards to assessing the credibility of the witnesses on the Petitioner's employment

status. Should there be any doubt as to whether Petitioner was terminated prior to his injury, that doubt must be resolved in favor of employment status and compensability of the injury.

The Order Reversing ALJ's Decision and Denying Benefits does not evidence a "liberal construction" and "resolution of doubt in favor of the claim." Rather, when there is any doubt in the record, particularly on the issue of credibility the Labor Commission construed those facts and the inferences from them against Petitioner and the right to compensation.

II

PETITIONER DEMONSTRATED LEGAL CAUSATION THAT HE WAS AN EMPLOYEE OF RESPONDENT AT THE TIME OF HIS INDUSTRIAL INJURY.

A. Petitioner Was An Employee of Respondent Ewing At The Time of His Industrial Injury.

The evidence is uncontroverted that Todd Flemal, (hereinafter "Petitioner"), was an employee of Chad Ewing, (hereinafter "Ewing" and/or "Respondent"), on the day of his industrial injury. Petitioner was a laborer, doing drywall and associated tasks. He had been so employed for 6-8 weeks prior to the day of his accident. Respondent Ewing would pick the Petitioner up each morning and drive him to that day's work site. Ewing would then instruct Petitioner as to what he was to do that day and how he was to do it. There is no evidence in the record that there had been any prior problem, question or concern about Petitioner's fitness or ability to do the work required nor any

issue about his job performance.

Respondent initially alleged in his Answer that Petitioner was not an employee but an independent contractor; however he withdrew that claim at the time of the Hearing herein, presumably because he was unable to meet the burden of proof to establish independent contractor status.

The ALJ and the Commission each specifically found, and the Respondents do not deny, that on April 16, 2007 Ewing picked up the Petitioner and, at least they drove in Ewing's vehicle to a hair salon in Syracuse, Utah which was that day's work site. (Presumably Bassett was also with them, but that is not clear in the record). Ewing testified that sometime after arriving at the work site he observed Petitioner "go around a corner and pull out a hypodermic needle and drugs." Petitioner denied that he had a needle on the job site bud did concede that he was a use of meth and marijuana around that time. The alleged needle was not seen by anyone else at the site.

Ewing testified that because of Petitioner's alleged drug use he immediately told him he was not needed anymore. Petitioner denied that Ewing terminated him and testified that he was instructed by Ewing to tape mud in the basement with another employee, Nick Bassett, and also sweep the floor and clean up debris. Bassett testified that although he did hear Ewing tell the Petitioner that his services were no longer required, but that he (Bassett) then walked out of range and didn't hear the rest of the conversation between Ewing and Petitioner. He could not definitively contradict Petitioner's testimony that Ewing changed his mind and did not fire him, and gave him specific instructions on what work to do.

It is not disputed that Ewing then left the job site to go and pick up his children. Although he had driven Petitioner to the work site and Petitioner did not have any other means to return home, Ewing did not take the Petitioner with him and left him at the job site with Bassett.

Petitioner did in fact go to the basement of the Salon where he stood on a crate and commenced taping mud on the ceiling. He was so engaged when the crate tipped over and a 1 ½ inch screw went through his left hand. His work activities and accident were observed by Bassett.

B. Respondent Failed in His Duty to Prove By A Preponderance Of The Evidence That He Had Terminated Petitioner Prior to His Industrial Injury.

Respondent has the burden of proving that he had terminated any employment relationship with Petitioner prior to the accident in question. He wholly failed in meeting that burden. The ALJ does find that Ewing "attempted to terminate the Petitioner on the morning of April 16, 2007" but that he failed to completely sever the employment relationship. (ALJ's Findings of Fact, Conclusion of Law, R. at 64).

Ewing's testimony that he terminated Petitioner is inherently self serving and is not credible. He did not issue Petitioner any kind of termination notice or make any written record of the alleged termination. He did not order him off the premises or report his alleged criminal behavior to the police. There is simply no evidence to support his claim of firing Petitioner prior to the workplace injury.

Ewing is the only one who saw the alleged needle. Although Petitioner had worked for him for 6 to 8 weeks prior to this time, this was the first time he ever saw

drugs or had any reason to believe that Petitioner was using or under the influence of drugs. He conveniently saw drugs and drug paraphernalia and terminated Petitioner just before the workplace injury.

It is important to note that although he alleged saw drugs on Petitioner's person and had reason to believe that Petitioner was using or under the influence, he did not order Petitioner off the premises, escort him from the site or call the police to report what, if true, was a felony. Instead, Ewing asks the Commission to believe that he simply left the scene leaving Petitioner and his drugs on the site to do as he pleased. Tthe ALJ did find that Ewing's failure to remove Petitioner from the premises was inconsistent and undercut his claim of observing drug use by Petitioner and then terminating him on that basis.

A reasonable Employer would not leave a drug user on his premises or work site unsupervised, whether that person be a stranger or an employee. The liability and risk of injury to the alleged drug user, other workers and even passerbys would be too great. Respondent's claim is just not credible. His claim that he did not remove or escort Petitioner off the premises because that would be "... humiliating for terminated employees to be paraded off the premises like a criminal." (R at 86). That, however is just what Respondent alleges Petitioner was, a criminal who was engaged in felony drug use on his premises. Respondent's claim is just not credible.

Petitioner was not performing work outside of his duties when he was injured. Respondents allege that the Petitioner was hired to clean up work sites and that mudding drywall was not incidental to his duties of "cleaning." The evidence at

Hearing however, also did not support this claim. The ALJ specifically found that "The Petitioner was a laborer, doing drywall and associated tasks." (ALJ Findings of Fact and Conclusions of Law, Addendum "B").

The ALJ found that "the evidence was clear" that despite being allegedly fired that after Ewing left "... the Petitioner proceeded to perform work that was in furtherance Ewing's business purpose, and that he injured his left hand while performing that work." (ALJ's Findings of Fact and Conclusions of Law, Addendum "B").

The fact that Petitioner remained on the premises and performed work is powerful and compelling evidence that he was still employed and performing work related services for Respondent. The ALJ found that "After the accident, the Petitioner used his cell phone to call Ewing..." It would make no sense for him to call the man who had just fired him to report that he had been injured on the job.

It is further not reasonable or consistent with being a drug user or under the influence of drugs that Petitioner would remain on the site and work after being fired. Respondent makes the fanciful conjecture that Petitioner did so in order to intentionally injury himself in order to claim workers compensation benefits. That, of course, is belayed by the fact that Petitioner did not initially report the injury as work related. Flemal had nothing to gain by reporting the injury as non industrial. Ewing however had much to gain, including escaping liability for not having workers' compensation insurance and being liable for the medical bills.

Although Respondent had also initially asserted the defense of illegal drug use

pursuant to UCA 34A-2-302(3)(b) he admitted he had no evidence to support that defense and withdrew it at Hearing. That claim was the entire basis for the alleged termination and yet Respondent abandoned it at Hearing.

Likewise, Respondent alleged in his Answer that Petitioner may have fallen intentionally and that his claim was thus fraudulent. At the Hearing however Respondent had no evidence to also support this allegation. Petitioner's accident and subsequent injury were observed by his co-worker Bassett. The nature and extent of his injuries were such that it was extremely unlikely that they could have been intentionally self inflicted.

Finally, it is important to note that it was uncontested that Ewing did not have workers' compensation coverage on April 16, 2007. Respondent's solvency was not addressed at the Hearing. The Petitioner testified that he was instructed by Ewing to report the accident as non-industrial to medical personnel. This explains his inventive and imaginative defenses, most of which he was forced to abandon at Hearing for lack of any support. His unlawful failure to have workers' compensation coverage explains his desperate attempt to claim he did not have employee's and that he had terminated Petitioner prior to the clearly compensable accident.

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CONCLUSION/STATEMENT OF RELIEF SOUGHT

Petitioner respectfully requests that the final agency action in Mr. Flemal's case be reversed, and that he be awarded benefits as awarded by the ALJ, as the sole disputed issue is his employment status.

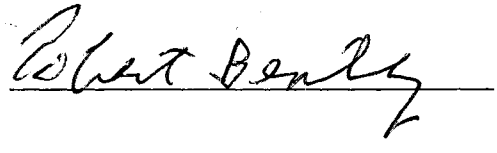
DATED this 11th day of July, 2011

for MICHAEL GARY BELNAP
Counsel for Petitioner
by permission

CERTIFICATE OF SERVICE

I hereby certify that on the 11 th day of July, 2011 a copy of the foregoing BRIEF OF PETITIONER TODD FLEMAL was hand-delivered and/or mailed, as follows:

UTAH COURT OF APPEALS 450 South State Street - 5TH Floor P.O. Box 140230 Salt Lake City, Utah 84111-0230	(1) original (7) copies (Hand-delivered)
Mr. Alan L. Hennebold UTAH LABOR COMMISSION Post Office Box 146600 Salt Lake City, Utah 84114-6600	(2 copies - Hand-delivered)
Mr. Theodore E. Kanell PLANT, CHRISTENSEN & KANELL, PC 136 East South Temple, Suite 1700 Salt Lake City, Utah 84111	(2 copies - Hand delivered)
Mr. Edward O. Ogilvie UNINSURED EMPLOYERS' FUND 160 East 300 South, 3rd Floor P.O. Box 146611 Salt Lake City, UT 84114-6611	(2 copies - Hand delivered)



Addendum A

Utah Code Annotated, Section 34A-2-401 (1953 as amended)

34A-2-401. COMPENSATION FOR INDUSTRIAL ACCIDENTS TO BE PAID.

(1) An employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid:

(a) compensation for loss sustained on account of the injury or death;

(b) the amount provided in this chapter for:
(i) medical, nurse, and hospital services;
(ii) medicines; and
(iii) in case of death, the amount of funeral expenses.

(2) The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be:

(a) on the employer and the employer's insurance carrier; and

(b) not on the employee.

(3) Payment of benefits provided by this chapter or Chapter 3, Utah Occupational Disease Act, shall commence within 30 calendar days after any final award by the commission.

Addendum B

Findings of Fact and Conclusions of Law
Administrative Law Judge Deidre Marlowe
August 2, 2010

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

TODD FLEMAL, **Petitioner,** **vs.** **CHAD EWING DBA ITALIAN DRYWALL; UNINSURED EMPLOYERS' FUND,** **Respondent.**	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** **Case No. 09-0026** **Judge Deidre Marlowe**

Hearing: June 30, 2009
Appearances:
Michael Belnap for the Petitioner
Theodore E. Kanell for Chad Ewing dba Italian Drywall
Edward O. Ogilvie for the Uninsured Employers' Fund

STATEMENT OF THE CASE

Todd Flemal filed an application for hearing on January 13, 2009 requesting medical expenses, recommended medical care, temporary total compensation from 4/17/07 to 11/30/07, permanent partial compensation (8%), interest and travel expenses. The Petitioner claimed that on April 16, 2007 he injured his left hand.

Respondent Chad Ewing dba Italian Drywall filed an Answer on February 11, 2009 denying that the Petitioner was within the course and scope of his duties when any injury occurred and thus the claims are non-meritorious. Furthermore the Petitioner was an independent contractor at the time and thus the claim cannot be brought against Ewing. Furthermore the claims are barred because the Petitioner engaged in illegal drug use.

At the hearing the Ewing withdrew his defense that the Petitioner was an independent contractor. Furthermore Ewing indicated he did not have required chemical testing evidence to support the UCA 34A-2-302(3)(b) defense of illegal drug use, and would not go forward with that specific defense. However, Ewing continues to argue that the Petitioner was terminated and therefore was not within the course and scope of his employment at the time of the accident.

Findings of Fact and Interim Order was issued on October 30, 2009, determining that the case needed to be sent to a medical panel. I assigned Dr. Joseph Q. Jarvis to chair the panel; he associated Dr. Dennis Gordon as a member of the panel. The medical panel reviewed the Interim Findings, medical records, diagnostics, and examined the Petitioner. The medical panel

then filed a report on May 6, 2010 with the Adjudication Division. Copies were promptly distributed to the parties. No objections were received and thus the report is admitted into evidence. The case is now ready for final order.

FINDINGS OF FACT

Todd Flemal, hereinafter "Petitioner," began working for Ewing 6-8 weeks before the accident day herein. The Petitioner was a laborer, doing drywall and associated tasks. They worked at various sites. Ewing would pick the Petitioner up in the mornings and they would go to the worksite.

The Petitioner testified they agreed he would be paid $10.00 per hour. No evidence was put on of how many hours the Petitioner worked in a week, however the Petitioner claimed "40+" hours per week on his application for hearing, which was not contested. This gives the Petitioner an average weekly wage of $400.00 and a compensation rate of $266.00 per week.

On April 16, 2007 Ewing picked up the Petitioner and the two drove to a job at a hair salon in Syracuse. Ewing testified that after they arrived at the worksite, he observed the Petitioner go around a corner and pull out a hypodermic needle and drugs. Because of this Ewing told the Petitioner he wasn't needed anymore.

Petitioner denies that he had a needle on the job site. Petitioner does admit that in that general time period he had been using methamphetamines and marijuana. At first he denied that he had been using on the day of the accident, but then he admitted it was possible he was using that day.

Furthermore the Petitioner denies that Ewing terminated him. The Petitioner testified that he was instructed by Ewing to tape mud in the basement with another employee, Nick Bassett, and also sweep the floor and clean up debris. The Petitioner was standing on a crate, taping mud on the ceiling, when the crate tipped over and a 1½ inch screw went through the Petitioner's left hand.

Mr. Bassett testified that he heard Ewing tell the Petitioner that the Petitioner's services were no longer needed, and not to perform any work. Then Bassett walked out of range and didn't hear the rest of the conversation. Ewing then left the site to go pick up his children. He didn't take the Petitioner with him because he didn't have time to take the Petitioner home.

Bassett testified that the Petitioner didn't have a ride home, so he said something like "well since I'm here I'm going to sweep." Later Bassett observed the Petitioner taping the ceiling and fall from the crate.

Ewing did not have workers' compensation coverage on April 16, 2007. The parties did not address the topic of Ewing's solvency at the hearing.

After the accident, the Petitioner used his cell phone to call Ewing, unsuccessfully, and also tried to find someone to take him to the hospital. He testified that he started walking to the hospital and eventually obtained treatment. The Petitioner testified that he was instructed by Ewing to report the accident as non-industrial to medical personnel. The Davis Hospital records do not at first reflect that the Petitioner alleged an on-the-job injury.

At Davis the screw was removed and the Petitioner was sent home with a course of penicillin. However he returned later with continuing pain and swelling and was diagnosed with cellulitis and an acute infection. ME pp. 2-5. He was admitted to the hospital. Dr. Charles Bean performed incision and drainage, along with a full carpal tunnel release, and release of the median and ulnar nerves on April 19, 2007. ME pp. 8, 10. The Petitioner continued to see Dr. Bean for followup care.

On May 17, 2007 Dr. Bean reported "Significant improvement. Median nerve seems to be returning. Infection is well under control." ME p. 13.

The Petitioner testified that although he had not been released to work by Dr. Bean at the time, that he began working in late October 2007 again for a company call Hamar Home Remodeling, doing light duty such as a little painting, etc.

Dr. Bean found the Petitioner at maximum improvement on December 17, 2007 ("I think Tyler is about as good as he is going to get.") ME p. 22. Dr. Bean gave the Petitioner a 7% upper extremity permanent impairment rating on February 25, 2008. ME p. 24.

On November 5, 2008 Dr. J. Eric Vanderhooft performed an independent medical evaluation. His diagnosis was late effect from puncture wound to palm, resulting in a deep space infection and nerve injury to the median and ulnar nerve at the wrist, presumably in the form of entrapment. These conditions were medically caused by the Petitioner's puncture wound on April 16, 2007. He probably would have been capable of returning to full duty with no restrictions in six weeks to two months after the surgery. ME p. 36. The Petitioner has a whole person impairment rating of 5%. Treatment rendered was necessary. ME p. 38.

Findings of Fact and Interim Order was issued on October 30, 2009, determining that the case needed to be sent to a medical panel. I assigned Dr. Joseph Q. Jarvis to chair the panel; he associated Dr. Dennis Gordon as a member of the panel. The medical panel reviewed the Interim Findings, medical records, diagnostics, and examined the Petitioner. The medical panel then filed a report on May 6, 2010 with the Adjudication Division.

The medical panel opined that the Petitioner was at medical stability on October 1, 2007. The medical panel further determined that the Petitioner has a 5% whole person impairment for his industrial injury.

CONCLUSIONS OF LAW

1. Causation

Utah Code Annotated § 34A-2-401 provides that an employee who is injured "by accident arising out of and in the course of the employee's employment" can receive benefits.

In Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986), the Utah Supreme Court adopted a two-part test causation analysis. The first component deals with "legal causation" while the second addresses "medical causation."

The preponderance of the evidence shows that Ewing attempted to terminate the Petitioner on the morning of April 16, 2007. Unfortunately he failed to escort the Petitioner off the premises. Indeed the evidence is clear that after Ewing left, the Petitioner proceeded to perform work that was in the furtherance Ewing's business purpose, and that he injured his left hand while performing that work. I conclude the Petitioner meets legal causation requirements.

With regard to medical causation, the Petitioner must show that any conditions for which he claims benefits are medically causally related to an industrial injury. "Under the medical cause test, the claimant must show . . . that the stress, strain or exertion required by his or her occupation led to the resulting injury or disability." Allen v. Industrial Commission, 729 P.2d 15, 27 (Utah 1986). The burden of proof is on the Petitioner.

The evidence clearly shows that the Petitioner's left hand puncture and subsequent conditions were medically causally related to the industrial accident.

Causation requirements have been met and the Respondents are liable for all appropriate benefits.

2. Medical Expenses

Under U.C.A. § 34A-2-418 the employer or the insurance carrier shall pay reasonable sums for medical, nurse, and hospital services, for medicines, and for artificial means, appliances, and prostheses necessary to treat the injured employee.

The preponderance of the evidence shows that the treatment given the Petitioner, including surgery and follow-up, medications, etc. were necessary to treat industrial conditions, thus Respondents are liable for these benefits.

2. Temporary Total Compensation

Utah Code Annotated § 34A-2-410 reads:

(1)(a) In case of temporary disability, so long as the disability is total, the employee shall receive 66 2/3 of that employee's average weekly wages at the time of the injury . . . .

With regard to the length of temporary total disability, benefits are to continue until the claimant's condition has stabilized. Stabilization means that the period of healing has ended and the condition of the claimant will not materially improve. Booms v. Rapp Constr. Co., 720 P.2d 1363, 1366-1367 (Utah 1986). Stabilization is a factual question to be determined by medical evidence contained in the record. Griffith v. Industrial Commission, 754 P.2d 981, 983-984 (Utah App. 1988).

The preponderance of the evidence shows that the Petitioner become medically stable on October 1, 2007. Thus the Petitioner is entitled to temporary total compensation from 4/17/07 to 10/1/07, a period of 23.86 weeks. This calculates to a temporary total compensation award of $6,346.76 ($266.00 x 23.86) for which the Respondents are liable.

4. Permanent Partial Compensation

Utah Code Annotated § 34A-2-412 reads:

(1) An employee who sustained a permanent impairment as a result of an industrial accident and who files an application for hearing under Section 34A-2-417 may receive a permanent partial disability award from the commission.

.....

(6)(a) For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence.

See also Utah Administrative Code Rule 612-7-3 Method for Rating.

The preponderance of the evidence shows that the Petitioner has a permanent partial impairment rating of 5%. This calculates to an award of $4149.60 (15.6 weeks x $266) for which the Respondents are liable.

5. Parties Liable

U.C.A. § 34A-2-701 indicates:

(1)(a) There is created an Uninsured Employers' Fund. The Uninsured Employers' Fund has the purpose of assisting in the payment of workers' compensation benefits to any person entitled to the benefits, if:

(i) that person's employer:
(A) is individually, jointly, or severally liable to pay the benefits; and
(B) (I) becomes or is insolvent;
(II) appoints or has appointed a receiver; or

(III) otherwise does not have sufficient funds, insurance, sureties, or other security to cover workers' compensation liabilities; and

(ii) the employment relationship between that person and the person's employer is localized within the state as provided in Subsection (2).

U.C.A. § 34A-2-701(11)(a) indicates:

For the purpose of maintaining the Uninsured Employers' Fund, an administrative law judge, upon rendering a decision with respect to any claim for workers' compensation benefits in which an uninsured employer was duly joined as a party, shall:

(i) order the uninsured employer to reimburse the Uninsured Employers' Fund for all benefits paid to or on behalf of an injured employee by the Uninsured Employers' Fund along with interest, costs, and attorney's fees; and

(ii) impose a penalty against the uninsured employer of 15% of the value of the total award in connection with the claim that shall be paid into the Uninsured Employers' Fund.

Accordingly, if Ewing is insolvent or will become insolvent if required to pay the benefits awarded the Petitioner in this order, the Uninsured Employers' Fund is required to pay the claim. The UEF shall have a right of reimbursement against Ewing and additionally, a 15% penalty on top of whatever it pays on this claim.

ORDER

Based upon the foregoing, and good cause appearing therefore, IT IS HEREBY ORDERED that Chad Ewing dba Italian Drywall and/or the Uninsured Employers' Fund shall pay Todd Flemal temporary total compensation from 4/17/07 to 10/1/07, at the rate of $266 per week for 23.86 weeks, for a total of $6,346.76, under Utah Code Annotated §34A-2-410. That amount is accrued, due and payable in a lump sum, plus interest at eight percent (8%) per annum, under U.C.A. § 34A-2-420(3) and Utah Administrative Code, Rule 612-1-5.

IT IS FURTHER ORDERED that Chad Ewing dba Italian Drywall and/or the Uninsured Employers' Fund pay a permanent partial impairment rating of 5% whole person in the amount of $4,149.60 to Todd Flemal in accordance with Utah Code Ann. Sec. 34A-2-412. Any unpaid amounts to date are due and payable in a lump sum, plus interest at eight percent (8%) per annum, under U.C.A. § 34A-2-420(3) and Utah Administrative Code, Rule 612-1-5.

IT IS FURTHER ORDERED that Chad Ewing dba Italian Drywall and/or the Uninsured Employers' Fund shall pay all medical expenses necessary to treat Todd Flemal's industrial injury according to Utah Code § 34A-2-418, and the medical and surgical fee schedule of the Utah Labor Commission, and travel allowances under Utah Administrative Code Rule 612-2-20 plus interest at eight percent (8%) per annum.

IT IS FURTHER ORDERED that statutory attorney's fees of $25%, plus twenty-five percent (25%) of the interest awarded herein, shall be deducted from the compensation awarded above to Todd Flemal, and sent directly to Michael Belnap, according to U.C.A. § 34A-1-309 and U.A.C. Rule 602-2-4.

IT IS FURTHER ORDERED that Chad Ewing shall reimburse the Uninsured Employers' Fund all monies advanced in payment of this claim, along with an additional 15% penalty.

DATED this 2nd day of August 2010.

Deidre Marlowe
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.

Todd Flemal vs. Chad Ewing dba Italian Drywall and/or Uninsured Employers Fund Case No. 09-0026

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER was mailed by prepaid U.S. postage on August 2, 2010, to the persons/parties at the following addresses:

Todd Flemal
3880 Childs Ave
Ogden UT 84405

Chad Ewing dba Italian Drywall
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Uninsured Employers Fund
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UTAH LABOR COMMISSION

Clerk
Adjudication Division

Addendum C

Order Reversing ALJ's Decision and Denying Benefits
Utah Labor Commissioner Sherrie Hayashi
December 15, 2010

UTAH LABOR COMMISSION

TODD FLEMAL, Petitioner, vs. CHAD EWING, d.b.a. ITALIAN DRYWALL, and UNINSURED EMPLOYERS FUND, Respondents.	ORDER REVERSING ALJ'S DECISION AND DENYING BENEFITS Case No. 09-0026

Chad Ewing, a sole proprietor doing business as Italian Drywall, and the Uninsured Employers Fund ("UEF") ask the Utah Labor Commission to review Administrative Law Judge Marlowe's award of benefits to Todd Flemal under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Flemal claims benefits for left-hand injuries resulting from an accident on April 16, 2007. According to Mr. Flemal, the accident occurred while he was working for Mr. Ewing, but Mr. Ewing asserts he had terminated Mr. Flemal's employment prior to the accident.

After an evidentiary hearing, Judge Marlowe concluded that an employment relationship continued to exist between Mr. Ewing and Mr. Flemal at the time of the April 16 accident and that Mr. Flemal's injuries arose out of and in the course of that employment. Judge Marlowe therefore ordered Mr. Ewing and the UEF[1] to pay workers' compensation benefits to Mr. Flemal.

Mr. Ewing's motion for review of Judge Marlowe's decision reiterates that Mr. Flemal was not Mr. Ewing's employee when the April 16 accident occurred; consequently, Mr. Flemal's injuries did not arise in the course of employment. Mr. Ewing also argues that, even if there was an employment relationship, the actions leading to the accident were outside the scope of Mr. Flemal's employment. Finally, Mr. Ewing contends the evidence does not support Judge Marlowe's determination of Mr. Flemal's compensation rate. The UEF joins in Mr. Ewing's arguments.

[1] Pursuant to § 34A-2-704 (1) (a) of the Utah Workers' Compensation Act, the UEF assists in paying worker's compensation benefits to injured workers whose employers are uninsured and insolvent.

SUMMARY OF EVIDENCE AND FINDINGS OF FACT

Some of the material facts regarding Mr. Flemal's employment and accident are undisputed. On approximately March 1, 2007, Mr. Ewing, a drywall contractor, hired Mr. Flemal as a helper. Mr. Ewing paid Mr. Flemal in cash, without withholding any taxes or providing any wage statement or other documentation. Mr. Ewing also failed to maintain workers' compensation insurance coverage for his employees.

Because Mr. Flemal did not have a car, Mr. Ewing drove him to and from the various work sites. On the morning of April 16, 2007, Mr. Ewing drove Mr. Flemal to a drywall project in Syracuse, Utah. Mr. Bassett, another of Mr. Ewing's employees, was also working at the site. That day, as Mr. Flemal was standing on a crate to finish the basement ceiling, the crate gave way. Mr. Flemal fell and a 1½ inch screw lodged in left hand.

While the foregoing facts are not in dispute, other relevant facts are sharply disputed.

Mr. Ewing testified that after he and Mr. Flemal arrived at the job site, he observed Mr. Flemal with a hypodermic needle containing a substance Mr. Ewing believed to be a drug. Based on this observation, Mr. Ewing told Mr. Flemal "he wasn't needed anymore." Mr. Ewing then left Mr. Flemal at the job site because Mr. Ewing had to pick his children up from school.

Mr. Bassett, the other employee present at the accident scene, corroborates Mr. Ewing's statements. Mr. Bassett heard Mr. Ewing tell Mr. Flemal that his help wasn't needed anymore; that Mr. Flemal was not to perform any work; and that he would take Mr. Flemal home after he picked his children up. Mr. Bassett testified that after Mr. Ewing left the work site, Mr. Flemal said "since I'm here I'm going to sweep." Later, Mr. Bassett saw Mr. Flemal standing on the crate to work on the ceiling, and then fall from the crate.

Mr. Flemal tells a different story. He denies that Mr. Ewing terminated his employment or told him not to do any work on April 16. To the contrary, Mr. Flemal testified that, after he and Mr. Ewing arrived at the Syracuse job site on April 16, Mr. Ewing assigned various tasks to him. Mr. Flemal was in the process of performing his work when he fell from the crate and injured his hand. Mr. Flemal denied possessing a hypodermic needle at work that day. However, he was equivocal about his actual use of drugs that day and he admitted intravenous methamphetamine use and marijuana use before and after the day of the accident.

Mr. Flemal's version of events cannot be reconciled with the testimony of Mr. Ewing and Mr. Bassett. In considering which, if either, version is true, the Commission notes that both Mr. Flemal and Mr. Ewing have a financial interest in the outcome of this matter. Mr. Flemal's credibility is diminished by his admitted drug use and his unconvincing testimony regarding his use of drugs on the day in question. Mr. Ewing's credibility is diminished by his failure to comply with several state and federal tax and employment laws—in particular, his failures to document payment of wages.

maintain workers' compensation coverage, or withhold payroll taxes. Additionally, the fact that Mr. Ewing allowed Mr. Flemal to remain on the work site after his purported firing suggests that Mr. Flemal was never fired at all. However, that inference is rebutted by Mr. Ewing's explanation of his need to pick up his children from school before he could take Mr. Flemal home.

While the testimony of Mr. Flemal and Mr. Ewing is subject to doubt, Mr. Bassett's testimony is more persuasive. He has no direct personal interest in this matter. His testimony was direct and internally consistent. Although Mr. Bassett was not present in the hearing room to hear Mr. Ewing's testimony, his testimony corroborated Mr. Ewing's version of events. The Commission therefore accepts the testimony of Mr. Ewing and Mr. Bassett regarding the events leading to Mr. Flemal's accident on April 16.

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2-401 (1) of the Utah Workers' Compensation Act provides medical and disability benefits to employees injured "by accident arising out of and in the course of the employee's employment." The threshold issue in this case is whether, at the time of his accident on April 16, Mr. Flemal was still employed by Mr. Ewing so that his injuries can be said to arise "in the course" of that employment.

In *Walls v. Industrial Commission*, 857 P.2d 964, 967 (Utah App. 1993), the Utah Court of Appeals noted that

> . . . an injury occurs in the course of employment when it takes place (1) *within the period of employment*, (2) at a place where the employee reasonably may be in the performance of [the employee's] duties, and (3) *while [the employee] is fulfilling those duties or engaged in doing something incidental thereto*. . . . Moreover, all three criteria of time, place and circumstances must be fulfilled in order for a claimant to recover workers' compensation benefits."

(Citations and internal quotation marks omitted; emphasis in original.)

In *Walls, ibid*, the individual seeking workers' compensation benefits had stayed at her place of employment for several hours after her shift had ended in order to socialize. The Court of Appeals observed that courts of other jurisdictions "have consistently held that employees who remain on the work premises following their employment for their own social purposes are not entitled to workers' compensation benefits." *Walls* at 968. While Mr. Flemal did not remain at the work site in this case for "social purposes," but was instead waiting for a ride home, the Commission does not view that difference as significant. The fact remains that Mr. Flemal's employment had ended. His subsequent actions, which resulted in his accident and injury, were not within the period of his employment and, consequently, were not in the course of his employment. Consequently, his injuries are not compensable under § 34A-2-401 (1) of the Utah Workers' Compensation Act.

ORDER

The Commission sets aside Judge Marlowe's award of benefits in this matter. The Commission concludes that Mr. Flemal's injuries did not arise in the course of his employment and for that reason are not compensable under the Utah Worker's Compensation Act. Mr. Flemal's claim for benefits is therefore dismissed. It is so ordered.

Dated this 15th day of December, 2010.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Reversing ALJ's Decision and Denying Benefits in the matter of Todd Flemal, Case No. 09-0026, was mailed first class postage prepaid this 15th day of December, 2010, to the following:

Todd Flemal
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Sara Danielson
Utah Labor Commission